In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-795

MARIO CURBELO-TALVARA AND
OCTAVIO PINO-VILLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners allege that the court of appeals erred in concluding that the admission of certain hearsay statements at trial constituted harmless error. In addition, petitioner Pino argues that his right to counsel was violated when a statement that he made to an informant after his indictment was introduced at trial.

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on three counts charging conspiracy, importation of marijuana, and possession of marijuana with intent to distribute (21 U.S.C. 841(a)(1), 952(a) and 960(b); 18 U.S.C. 371). Petitioner Curbelo was sentenced to consecutive

five-year prison terms on each count and given a special parole term of two years. Petitioner Pino was sentenced to concurrent five-year prison terms on two counts and given a special parole term of two years; in addition, he was given a consecutive sentence of five years' imprisonment and a special parole term of two years on count three. The court of appeals affirmed (Pet. App. A).[1]

The evidence is outlined in the opinion of the court of appeals. Briefly, petitioner Curbelo introduced Juan Ortiz, then a government informant, to Raul Gonzales, an alleged narcotics smuggler from Colombia. Gonzales in turn introduced Ortiz to Nacre Dace. Subsequently, pursuant to a plan between Dace and petitioner Curbelo to smuggle some marijuana from Colombia, Curbelo agreed to pay Ortiz, a pilot, to fly to Colombia and pick up the contraband (rr. 133-137).[2] Curbelo, accompanied by Pino, later gave Ortiz the money with which to rent a plane for this purpose. Ortiz was instructed to fly the contraband to the Leesburg, Florida, airport, where he was to be met by petitioners Curbelo and Pino (rr. 6-7).

Ortiz made the flight as planned, but upon landing at the Leesburg airport he found no one there to take possession of the marijuana he carried and he was not able to locate either of the petitioners. Consequently, he deposited the marijuana, which weighed almost a ton and was packed in twenty-four cigarette cartons, along one of the airport runways and then

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[1]Four other defendants, Armando Arias-Diaz, Delfin Hondares-Alfaro, Pedro Alvaro Zarzabal-Naranjo and Jose Quinones-Pita, were also convicted of possession of marijuana. The court of appeals reversed Zarzabal's conviction for insufficiency of the evidence and affirmed as to the other three.

[2]The transcript references used here correspond to those used in the petition, p. 3.

continued to Miami. At three o'clock the following morning, Ortiz received a telephone call from petitioner Pino. Pino inquired about the location of the marijuana, which Ortiz disclosed to him (rr. 14-15).

Between thirty minutes to one hour after petitioner Pino called Ortiz, customs agents spotted four cars pull up and park near the east-west runway of the Leesburg airport. Shortly thereafter, three of the cars proceeded to the runway where Ortiz had dropped the marijuana and the occupants retrieved the cartons (Tr. 322-327). All four of the cars then left the airport and headed toward Leesburg (Tr. 399). Customs agents stopped the cars before they reached Leesburg and arrested the occupants. The agents found cartons of marijuana in all the cars except petitioner Curbelo's. Petitioner Pino was driving a car containing nine cartons of marijuana (Pet. App. A7).

1. Ortiz testified at trial that after the arrests and indictment, defendant Quinones spoke with him and disclosed that petitioners suspected someone had informed and that they intended to kill that individual on discovering his identity. Petitioners argue that Quinones' statement constituted inadmissible hearsay and that the court of appeals, recognizing the inadmissibility of the statements, applied the wrong test in concluding that the error was harmless. The court of appeals, not considering the error to be of constitutional magnitude, applied the "substantial influence" test of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765, rather than the "beyond a reasonable doubt" standard specified in *Chapman* v. *California*, 386 U.S. 18, 24, for constitutional error.

We agree that Quinones' statements were not admissible under the federal hearsay rule. A hearsay statement by a co-conspirator made in furtherance of a conspiracy is of course generally admissible against other conspirators, but after the object of a conspiracy has been attained or defeated, as in the instant case, the utterance is not admissible under the federal hearsay rule. See *Anderson* v. *United States*, 417 U.S. 211; *Lutwak* v. *United States*, 344 U.S. 604; *Krulewitch* v. *United States*, 336 U.S. 440. Contrary to petitioners' assertion, however, this rule has not been generated by constitutional mandate but solely by considerations of sound jurisprudence implemented pursuant to this Court's rule-making powers. See *Dutton* v. *Evans*, 400 U.S. 74, 81-82.

In *Dutton* v. *Evans*, *supra*, the Court declined to hold unconstitutional a state evidentiary rule permitting the admission of a co-conspirator's hearsay statement made as part of an effort to conceal the conspiracy. Thus, it is clear that the trial court's departure from the federal hearsay rule in the present case was not an error of constitutional magnitude and that the court of appeals was correct in not applying the more stringent "beyond a reasonable doubt" test in concluding that the error was harmless. In any event, however, we submit that the evidence against petitioners—particularly their being apprehended with almost a ton of marijuana after having been observed retrieving it from the Leesburg airport—was sufficient to warrant the conclusion that the admission of Quinones' statement did not affect the jury's verdict even if the more rigorous test of harmless error is applied.

2. Petitioner Pino also argues that a statement which he made to Ortiz after the arrests and indictment, about which Ortiz also testified at trial (Pet. 7-12), was admitted in violation of his Sixth Amendment right to the assistance of counsel as defined in *Massiah* v. *United States*, 377 U.S. 201. In *Massiah*, after the defendant had been indicted and had obtained counsel, an informant—at the government's request and direction—deliberately elicited inculpatory statements from the defendant. These statements were transmitted to government agents by means of a radio device concealed under the front seat of the informant's car. This practice was deemed a denial of the defendant's right to counsel. In the instant case, by contrast, there is no indication in the record, and petitioner Pino does not allege, that Ortiz had deliberately sought him out or elicited the damaging statements from him. Consequently, there was no overreaching by the government and reliance by petitioner Pino on the Court's decision in *Massiah* is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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